1966 he was awarded $36,015 damages and costs. Failing to recover payment from the defendants or the appellant, their insurers, the respondent brought the action the subject matter of this appeal, to enforce payment by the appellant under the provisions of section 80(1) of the Road Traffic Ordinance 1958. Mr. Hilborne, of the firm of advocates and solicitors retained by the appellant, appeared as counsel at the trial of the action which was heard on March 18 and 19, 1970. A written judgment was delivered on May 24, 1970 in favour of the respondent for $47,817 and costs. The judgment was available to the parties on application and Mr. Wrigglesworth, counsel for the respondent was able to receive, not only a copy thereof but also the notes of evidence, from the secretary to the judge on June 28, 1970. Notice of appeal had been duly filed by the appellant's solicitors on June 23, 1970 — the very last day to do so. They should have received their copy of the notes of evidence at the same time as Mr. Wrigglesworth, or, allowing for delay in the post, by June 30, 1970 at the latest — had they seen fit to apply for same upon filing the notice of appeal. The notes of evidence were of course *sine qua non* once notice of appeal was filed. The appellant's solicitors, however, did nothing about promptly applying for the notes, not even bestirring themselves after they had been informed by the Chief Registrar of this court on July 9, 1970 that the appeal record should be filed on or before August 4, 1970. Mr. Hilborne does not say in his affidavit, of August 17, 1970, whether he had applied for the notes before July 9 or, if after July 9, how long thereafter. What he stated in his affidavit of August 17, 1970 on this point was as follows: —

"4. Since the receipt of the letter from the Chief Registrar, Federal Court as aforesaid, I have received the certified copy of the notes of evidence of the said action, *on or about the 30th day of July, 1970,* but have not received the exhibits to enable me to include them in the record of appeal which is in the course of preparation."

Mr. Wrigglesworth, however, has filled the gap in our knowledge as to the diligence shown by the appellant's solicitors, by his affidavit of November 17, 1970: —

"14. I now produce a certified true copy which I have recently obtained of the letter written by Messrs. Wilson & Company on behalf of Mr. Hilborne to the secretary to the judge, Kota Bharu on 21st July, 1970 applying for a copy of the notes of evidence and grounds of judgment (but not the documentary exhibits) in the said civil suit. It also appears from an endorsement on that letter that the notes of evidence were delivered to Messrs. Wilson & Company on 25th July, 1970. A copy of the said letter is attached hereto and marked 'HLW 4'. I also produce a certified true copy of the relevant receipt for the copy of notes of evidence, a copy of which is attached hereto and marked 'HLW 5'."

The time for filing the record of appeal expired on August 4, 1970. If the notes of evidence received on July 30 showed that the record could not be completed for filing in time Gill F.J. has stated in his judgment what could readily be done in the circumstances. At least an application should have been filed before August 4 for an extension of time. Was reasonable diligence shown when the motion papers were not filed till August 24?

With all respect to learned counsel for the appellant and having seen the judgment of Ibrahim J., against which the notice of appeal was filed, I have serious doubts whether the exhibits — the absence of which was said to be the reason for the solicitors' inability to file a complete record of appeal — were necessary or even relevant. Only two issues were raised in the action. The issue of fact is no longer open to challenge. The other is a question of law and I am unable to see how the inclusion of the letter of October 10, 1963 relevant to the question was necessary when the material portion thereof was set out *verbatim* in the judgment.

In my view, the inability of the appellant's solicitors to file the appeal record in time was due solely to their own fault, for which this court should show no indulgence. There is, in my opinion, not only a lack of merit in the application, but also *ex facie* in the appeal itself.

Ali F.J. concurred.

Application dismissed.

Solicitors: *Hilborne & Co.; Wrigglesworth & Co.*

WOON MOOI HUA & ANOR. v. TAN KAY SWEE

[O.C.J. (Chang Min Tat J.) January 16, 1971]

[Ipoh — Civil Suit No. 768 of 1968]

Executors and Administrators — Accounts — Right of executors and administrators and delegatus non potest delegare — Trustees Ordinance, 1949, s. 27 — Limitation Ordinance, 1953, s. 22 — R.S.C. 1957, O. 15, r. 1, O. 30 r. 2, O. 70 r. 1.

The plaintiffs claimed as personal representatives of the estate of *TBC* for accounts and a declaration that several transfers of property belonging to the estate were procured by fraud, mistake or undue influence by the defendant, and for consequential reliefs. It was common ground that *TBC* died in 1955 and by his will appointed the first plaintiff and one *LKH*, his widows, his executrices and trustees. Probate was granted to them. *LKH* died in 1962 and in her place the second plaintiff herself also a widow of *TBC* was appointed a co-personal representative. The defendant and one *TKE* are two of *TBC's* sons. The first plaintiff and *LKH*, by two instruments, appointed the defendant and *TKE* their attorneys to administer the estate generally under the will. The powers of attorney were revoked after 10 years. The plaintiffs alleged that at no time had the defendant ever given any accounts of his management and his several dealings with the assets of the estate. The plaintiffs took out a summons in chambers for accounts.

The defendant objected to the demand for accounts on a number of grounds. He also contended that the first plaintiff and *LKH* were themselves administering the estate and charged the plaintiffs with undue haste as the summons for accounts were taken before the time agreed for delivery of the defence had expired.

Held: (1) the plaintiffs were not merely trustees. Both under the will and by the grant of probate, they had been constituted the executrices of the estate and as such the rule *delegatus non potest delegare* has no application. The defendant as a *delegatus* was an accounting party, and it was his duty to account for all his dealings. There was no preliminary point to be tried;

(2) as the action by the plaintiffs was as beneficiaries and on behalf of other beneficiaries, section 22(1)(a) and (b) of the Limitation Ordinance, 1953 applied and there was no bar to the action;

(3) whether as donor of the power and suing as such donor or whether as legal personal representative of the estate

together with the second plaintiff, the first plaintiff and the second plaintiff have the right to accounts from someone who either under the powers given to him or *de son tort* had acted in the management of the estate.

Case referred to:-

(1) *Earl Vane* v. *Rugden* (1870) L.R. 5 Ch. App. 633 at pp. 668-669.

CIVIL SUIT.

H. L. Wee (*Lim Kean Chye* with him) for the plaintiffs.

Lim Kean Siew (*N. H. Chan* with him) for the defendant.

Cur. Adv. Vult.

Chang Min Tat J.: In this action, the plaintiffs originally claimed as the personal representatives of the estate of Tan Boon Chong deceased for accounts and a declaration that the several transfers of property belonging to the estate were procured by the fraud, mistake or undue influence by the defendant and for consequential reliefs.

The writ was only served after it had been renewed and the defendant entered appearance on 3rd March 1970.

It is common ground that the deceased died on 16th October 1955 and by his will appointed two widows, the first plaintiff and one Lim Kooi Hua his executrices and trustees. Probate was granted to them. Lim Kooi Hua died on 20th May 1962 and in her place the second plaintiff herself a widow of the deceased was appointed a co-personal representative. The defendant and Tay Kay Eng are two of the deceased's sons.

By two instruments, the first plaintiff and Lim Kooi Hua appointed the defendant and Tay Kay Eng their attorneys to administer the estate generally under the will. The powers of attorney were revoked after 10 years.

It was alleged by the plaintiffs that at no time had the defendant ever given any accounts of his management and his several dealings with the assets particulars of which were given.

On 17th March 1970 the plaintiffs took out a summons in chamber under O. 15 r. 1 or O. 30 r. 2 for accounts. Affidavits by both the plaintiffs were filed in support.

Objection was taken to this demand for accounts and various grounds were stated in an affidavit by the defendant. They were

(1) the summons in chambers were wrongly instituted.

(2) O. 15 r. 1 and O. 30 r. 2 of the Rules of the Supreme Court, 1957 did not apply as there were special issues and preliminary questions to be tried *viz.*

(a) that the defendant owed no duty of accounts to the second plaintiff as he was never the administrator and the second plaintiff had not given him any powers to administer,

(b) the two instruments were not given to him alone but to him and Tay Kay Eng and therefore Tay Kay Eng should have been joined as an accounting party,

(c) the powers of attorney given were illegal and void, or

(d) if proper and legal, became inoperative in 1959, after 3 years,

(e) the plaintiffs were not entitled to the accounts as claimed or at all as Lim Kooi Hua a donor had died in 1962,

(f) the demand was for special accounts.

It was also contended that the first plaintiff and Lim Kooi Hua were themselves administering the estate. The plaintiffs were further charged with undue haste as the summons for accounts were taken out before the time agreed for the delivery of the defence had expired. Objection was also taken to the form of the schedule of particulars.

Before the summons for accounts could be heard, an application was made by the plaintiffs to amend the headings in the summons for accounts and the affidavits in support to read "the personal representatives of the estate of Tan Boon Chong deceased" in place of "widow." The application for amendment despite the strong opposition of the defendant was allowed.

Then on 29th April 1970, the solicitors for the plaintiffs took out another summons for the addition of Tay Kay Eng as an additional defendant. On the 5th May 1970, the solicitors for the defendant made a similar application.

The defence of the defendant was delivered on 29th April 1970. So far as I can see, the defence repeated the several objections to the accounts and in addition alleged that accounts had been rendered and claimed that the demand was barred by limitation, alternatively by laches and acquiescence.

The parties in turn then took out applications for cross-examination of each other on their affidavits.

At the hearing, counsel for the defendant insisted on the summons for accounts being heard as unamended and to save arguments, counsel for the plaintiffs agreed.

It may perhaps be convenient if at this stage I refer to the other summonses heard by me. On the plaintiffs' application to add Tay Kay Eng as another defendant an order was made in terms the costs to be in the cause. By consent no order was made on the defendant's later application to add Tay Kay Eng, except that the costs were to the plaintiffs' in any event. The application to cross-examine the other parties was adjourned *sine die* with liberty to apply.

I will now deal with the several objections to the summons for accounts.

The first objection was merely to the intitulement of the summons and while correctly taken, it was admitted by counsel for the defence that the irregularity was curable at the discretion of the judge. For myself I conceive it to be legal pedantry to dismiss the application merely on this procedural ground, as a fresh application would bring the matter up again. Under O. 70 r. 1 of the Rules of the Supreme Court,

non-compliance with any rules does not necessarily render the proceedings void, unless the judge directs. In view of the order previously made for amendments, I do not consider it necessary for me to make any order dismissing the application merely on this procedural objection.

Then it was said that there were preliminary questions in respect of the accounts to be tried before an order for them can be made under O. 15 r. 1 which reads:

"Where a writ of summons has been indorsed for an account, under Order 3, rule 8, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the court or a judge that there is some preliminary question to be tried, an order for proper accounts, with all necessary inquiries and directions, shall be forthwith made."

The first question raised was whether the two powers of attorney were valid. It was contended that a trustee who intended to remain outside the country for a period exceeding 14 days only could delegate his powers as a trustee, under section 27(1) Trustee Ordinance No. 66 of 1949 and that the donors being all the time resident herein could not cause the powers to come into operation under section 27(3), had not made a statutory declaration of intention to be out of the country for a period exceeding 14 days under section 27(4) and that no power of attorney given by a trustee was operative for more than 3 years after execution under section 27(9). If at all valid, the powers would have expired on 16th October 1959. It was also contended that the powers granted by Lim Kooi Hua ceased with her death on 20th May 1962.

The short answer to this objection is of course that the plaintiffs are not merely trustees. Both under the will and by the grant of probate, they have been constituted the executrices of the estate and as such they are not in the position of a *delegatus*. In *Inzpen* on Executors and Administrators (1st Edn.) there occurs this passage at p. 215

"Both at law and in equity the executor or administrator is the absolute-owner of the assets of the testator or intestate: he does not stand in the position of a *delegatus* and nothing can interrupt that ownership, except fraud or collusion as between him and the parties with whom he deals. He is at liberty either to sell or to pledge the assets ... and so also the executor or administrator may give to another a power of attorney or authority to do any act to render a mortgage effectual such as a power of sale or a power to collect assets. The rule *delegatus non potest delegare* has no application to such a case, since the position of an executor or administrator in relation to assets of the testator or intestate, differ from that of a trustee or a donee of a bare authority or of a particular power."

which appears to me to summarise the law. However if authority is needed, the judgment of Lord Hatherley L.C. in *Earl Vane* v. *Rugden*[1] at pp. 668-669 will, I believe, conclusively settle the matter:

"As long ago as the case of *Scott* v. *Tyler*, 2 Dick. 712, 725, Lord Thurlow expressed his opinion clearly to be that the executor is at liberty either to sell or to pledge the assets of the testator. In fact, he has complete and absolute control over the property and it is for the safety of mankind that it should be so; and nothing which he does can be disputed except on the ground of fraud or collusion between him and the creditor. That like all other frauds, will vitiate any transaction whatever.

A question was raised as to whether this lady could depute by power of attorney as executrix to get in these debts in her name as representative of the testator. I apprehend it is a fallacy to say that such an authority is void under the rule *delegatus non potest delegare*. The very point was discussed in the case of *Russell* v. *Plaice*, 18 Beav. 21. That was a case in which an executrix made a mortgage of a leasehold with power of sale and, it was argued that the executor could have sold the leasehold but the mortgagee could not do so, because the power was a delegated power. The Master of the Rolls held, as it seems to me, quite correctly, that in the eye of the court, as well as in the eye of a court of law, the executor is the absolute owner of the property; he does not stand in the position of a *delegatus* and nothing can intercept that ownership, except fraud or collusion as between him and the parties with whom he deals...."

It is in my view reasonably clear that the defendant as a *delegatus* is an accounting party. That he had acted over a certain period of time is also reasonably clear. It may be that he had acted together with or apart from Tay Kay Eng. The latter might well be another accounting party and I am confident that if the plaintiffs had not made him so, the defendant would have which was precisely what had been done. What the period over which the defendant had acted as an attorney, if it is a matter of dispute, must be determined by evidence, so that for the moment it appears to be immaterial whether the power given by Lim Kooi Hua appointing the defendant the attorney had in law died with her. What is material is whether, subsequent to her death, the defendant had continued to act, either despite the revocation by the death of Lim Kooi Hua or under the power given by the first plaintiff. And if as I conceive it, it is the plain duty of the defendant to account for all his dealings, he should, I think, be left to file such accounts as he thinks he should do, leaving it to the other parties, if they are not satisfied, to apply to court on such evidence as they may have of dealings for other or subsequent period or periods, for a further order for accounts for such period or periods. As an useful exercise in pragmatism, I shall leave the jumping of this hurdle till we come to it. But for the moment, I confess myself unable to see any preliminary question to be tried.

As for limitation, which was raised, as pointed out only in the defence delivered, I think section 22(1) (a) and (b) of the Limitation Ordinance 1953 which reads as follows.

"22. (1) No period of limitation prescribed by this Ordinance shall apply to an action by a beneficiary under a trust, being an action —

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use."

seems to me to be the answer. The action by the plaintiffs is as beneficiaries and for and on behalf of the other beneficiaries.

The other objection that the application was for special accounts and such an application was not entertainable under O. 15 r. 1 of the Rules of the Supreme Court was met by the concession of counsel for the applicants that he was asking for ordinary accounts.

Finally, I do not for myself with respect see any dichotomy between the first plaintiff as donor of the

power and her position as the personal representative of the estate. Whether as donor and suing as such donor (and the joining of the second plaintiff as an additional plaintiff does not appear to me to have any effect at all on the application) or whether as legal personal representative of the estate together with the second plaintiff she and the second plaintiff clearly have the right to accounts from someone who either under the powers given to him or *de son tort* had acted in the management of the estate.

There will therefore be an order in terms of the summons.

I would at the same time indicate that I would not require any further arguments and if there should be an appeal from my decision, I would be prepared to certify to this effect.

Order in terms.

Solicitors: *Lim Cheng Ean & Co.; Cheang Lee & Ong.*

MARY MICHAEL v. UNITED MALAYAN BANKING CORPORATION BHD.

[F.C. (Azmi L.P., Gill and Ali F.JJ.) November 20, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 54 of 1970]

Land Laws — Land charged as security for overdraft — Principal sum payable on demand — Claim for repayment of amount due including interest — Notice issued in Form 16D — Whether valid notice — National Land Code, 1965, ss. 254 and 255.

In this case the appellant had charged certain lands to the respondents as security for overdraft facilities to the extent of $35,000 with interest thereon at 9.6% per annum. The respondents caused a notice in Form 16D of the National Land Code to be served on the appellant demanding payment of the sum of $35,971.09 being the amount due as at July 26, 1968 with interest thereon at 11%. The appellant failed to comply with the notice and the respondent thereupon brought an application for the sale by public auction of the land. The appellant at the trial opposed the application on the grounds (a) that the purported notice in Form 16D served on her and issued under section 255(1) of the National Land Code was null and void, (b) that the bank had no right to increase the rate of interest on the loan.

The High Court gave judgment ordering the land to be sold by public auction but held that only interest at 9.6% could be charged on the advance made. The chargor appealed.

Held, dismissing the appeal: in this case although the principal sum was payable on demand, the chargee was seeking to recover also the interest which had become due and payable and therefore the notice in Form 16D was the appropriate notice. In the circumstances the learned trial judge was right in making the order for sale.

Observations on whether chargee can include interest in the notice.

Case referred to:-

(1) *Eliatamby* v. *Sheik Mohamed,* [1970] 2 M.L.J. 194.

FEDERAL COURT.

M. Segaram for the appellant.

Miss Thoo Chow Thye for the respondent

Azmi L.P.: The United Malayan Banking Corporation Berhad, hereinafter referred to as "the bank" applied by originating summons to the High Court at Kuala Lumpur, for the sale by public auction of a piece of land fully described in the summons as to its title and situation and charged to the bank by Mary Michael, herein referred to as the chargor, as security for overdraft facilities to the extent of $35,000 with interest thereon at 9.6% per annum.

The charge was executed on 7th August 1963 in the form provided by Schedule XXIV(C) of the Land Code Cap. 138. The memorandum of charge further provides that "when the payment of any money thereby secured or intended to be secured, shall be further secured to the bank by any bill of exchange, promissory note, draft, receipt, or other instrument reserving a higher rate of interest to be paid in respect thereof than that hereinbefore covenanted to be paid such higher rate of interest shall be payable in payment of such monies . . . "

Sometime in 1967, the bank decided to recall the overdraft. On 20th August 1968, the bank caused a notice in Form 16D of the National Land Code to be sent to the chargor demanding payment of the sum of $35,971.09 being the amount due as at 26th July 1968 with interest thereon at the rate of 11% with monthly rests within the period of one month from the date of service thereof, failing which, an order for the sale of the said land would be applied for. The chargor failed to comply with the said notice, and on 17th October 1968, the bank filed this originating summons.

The chargor through her attorney opposed this application on two grounds, namely: —

(1) that the purported notice in Form 16D served on her and issued under section 255(1) of the National Land Code was null and void, and

(2) that the bank had no right to increase the interest from 9.6% per annum to 11% per annum since at no stage of the transaction had the chargor executed any bill of exchange, etc. securing or intended to secure for the payment of the money secured.

She therefore asked that the bank's application be dismissed with costs.

The learned trial judge upheld the respondent's second objection being of the view that only interest at 9.6% per annum could be charged on the advance made. He, however, dismissed the chargor's first objection and ordered that the land be sold by public auction to satisfy the sum of $35,971.09 together with interest thereon at the rate of 9.6% with monthly rests due to the bank on 26th July 1968 up to the date of payment.

In dismissing the chargor's first objection, Raja Azlan Shah J. expressed the view that though the principal sum was repayable on demand the matter did not fall under section 255 of the National Land Code because this was not a case for the repayment of the principal sum only, but also of interest. Furthermore, the sum actually advanced was more than the amount originally fixed in the memorandum of charge to be the limit. He therefore held that the bank was right in serving on the chargor the notice in Form 16D. In coming to that decision the learned judge cited a decision of Sharma J. in the case of *Eliatamby* v. *Sheikh Mohamed.*[1] It is necessary, I think, to